SUBJECT INDEX.

List of Cases Referred to.

Supreme Court of the United States.

A. W. Duckett & Co. Inc.,
Appellant,

against

The United States,
Appellee.

OCTOBER TERM
1923
No. 409

APPELLANT'S BRIEF.

Statement.

This is an appeal from the judgment of the Court of Claims dismissing Duckett's petition for want of jurisdiction because, while the direct result of the action of the United States was to take possession, use and occupation of a pier in New York Harbor, the exclusive possession, use and occupation of which Duckett possessed by virtue of a three year lease of the premises, such action did not constitute such a "taking" of Duckett's property as implied an agreement to compensate it therefor.

Statement of Case.

(References are to pages in the Transcript of Record.)

A. W. Duckett & Co. Inc., a New York corporation (9) is engaged in the shipping business (10). During a portion of the period involved herein

Duckett was in the hands of an Equity Receiver (9). Since the receivership does not involve the questions at bar, hereafter both the corporation and the Receiver will be called "Duckett".

The Bush Terminal consists of a railroad, connecting main line railroads with many large warehouses and eight large piers in New York Harbor, all owned by the Bush Terminal Company (9).

The Bush Terminal Company leased Pier 8, Bush Terminal, to Duckett for the period October 1, 1916 to September 30, 1919 inclusive, (9, 3-8). Duckett entered the premises, possessed and operated the pier as part of its business until dispossessed by the United States in the manner hereinafter described (9, 12).

On December 31, 1917 the Secretary of War, by direction of the President, took possession of the Bush Terminal including Pier 8 (10). This action was taken under the authority of the Act of Congress, giving the President the power to requisition "systems of transportation" (Act of Congress, August 29, 1916; 39 Stat. 645) and of Section 10 of the Lever Act, (40 Stat. 276) authorizing the President to requisition "storage facilities for supplies connected with the common defense" (10).

The instrument of requisition was a proclamation of the Secretary of War addressed "To Whom It May Concern" and provided that "possession and control is hereby taken, by direction of the President, of the following described parts of a system of transportation, including storage facilities; that is to say, of all those portions of the Bush Terminal, docks and warehouse property described in Schedule 'A' and shown on the map, Schedule 'B' hereto annexed in the New York Harbor" which included Pier 8 (10). This proclamation distinctly stated that steps would

be promptly taken to ascertain and pay fair compensation for the temporary use of the premises (10).

On the same date that the proclamation was made the Acting Quartermaster General of the United States Army directed the General Superintendent of the Army Transport Service to take actual possession and control of the premises (11).

Under date of January 1, 1918, the Officer in Charge of the Division of Docks, Wharves and Terminals, in the Office of the General Superintendent of the Army Transport Service of the War Department, gave notice to Duckett that the Bush Terminal had been requisitioned for the use of the Embarkation Service of the United States Army and demanded that Duckett vacate Pier 8 at the earliest possible date (12).

Under dated of January 3, 1919 the Acting Quartermaster General notified the Bush Terminal Company of the action of the Secretary of War in the words of the proclamation (10).

When the Bush Terminal was requisitioned, a number of the piers and warehouses were in the possession of the Bush Terminal Company and a number, including Pier 8, were in the possession of lessees (13).

Thereafter, the Secretary of War appointed a Board of Appraisers to determine the proper compensation to be paid to the Bush Terminal Company for the use of the properties, to which proceeding Duckett was not a party (13).

Thereafter, the Board of Appraisers, advised the War Department that just compensation for the Bush Terminal Company for the portion of the Bush Terminal not under lease was $89,807.71 per month as of the date of the report; that this monthly compensation should be increased, from

time to time as the respective leases expired, by the amount reserved as rent in the expiring leases; that the rent of Pier 8 should be reduced from $5000 a month to $2325 per month by virtue of an agreement with the Bush Terminal Company, but to which Duckett was not a party, which provided that for the unexpired term of the Duckett lease the Government would pay the said rent to the Bush Terminal Company instead of to Duckett. This appraisal was accepted by the War Department and the Bush Terminal Company and payments were made in accordance therewith (13 and 14).

There were certain negotiations between the Officer in Charge of the Division of Docks, Wharves and Terminals and Duckett, as a consequence of which Duckett vacated and the United States took actual possession of Pier 8 at midnight, January 31, 1918, and remained in possession and control until midnight April 30, 1919 (15).

Duckett paid the Bush Terminal Company $5,000, the rent reserved in the lease, for the month of January, 1918. Thereafter the United States paid to the Bush Terminal Company $2325 per month to and including the month of April, 1919 (14 and 15).

At midnight, April 30, 1919, five months before the expiration of the term reserved in the Duckett lease, the United States surrendered the possession and control and gave the use and occupation of Pier 8, not to Duckett, from whom it had been taken, but to the Bush Terminal Company (15).

Duckett demanded possession, use and occupation of Pier 8 for the remainder of the term of the lease from Bush Terminal Company who, in turn, refused to put Duckett in possession unless and until Duckett paid to the Bush Terminal Com-

pany the difference between $5000 and $2325 per month during the period of the United States' occupation of the pier. Duckett refused to pay on the theory that since the Bush Terminal Company had covenanated for Duckett's quiet enjoyment of the use and occupation of the pier and since the sovereign of both had made it impossible for the Bush Terminal Company to perform its obligation during the period of the occupation of the United States, the rent was suspended during that occupation.

Thereupon the Bush Terminal Company leased the pier to others during the term of Duckett's lease at an increased rental (15, 16).

The reasonable value of the use and occupation of the pier on a basis of a full time valuation was $200 per day (17).

Argument.

The Court below states, in substance, that this is a case of first impression. It held that the practical effect of what was done, was to take from Duckett its property, to wit: a leasehold interest in Pier 8, Bush Terminal; that such "taking", however, lacked some of the elements of a "taking", that would imply a contract to pay therefor.

Courts have held that where the Government takes private property for public use, there arises an implied contract to pay just compensation therefor. (See Point I.)

But not every destruction or injury to property by Government agents constitutes such a "taking" (Tempel *vs.* U. S., 248 U. S. 121; Hill *vs.* U. S., 149 U. S. 593; Langford's case, 101 U. S. 341).

There must be a direct appropriation of the property as distinguished from consequential damages resulting from lawful Governmental ac-

tion. (Omnia Commercial Company *vs.* U. S., 261 U. S. 502; Monongahela Navigation Co. *vs.* U. S., 148 U. S. 312; Horstmann *vs.* U. S., 257 U. S. 138; Bedford *vs.* U. S., 192 U. S. 217; Kansas *vs.* Colorado, 206 U. S. 46; Gibson *vs.* U. S., 166 U. S. 269; Transportation Co. *vs.* Chicago, 99 U. S. 635).

The "taking" must be *ex contractu* and not *ex delicto.* (U. S. *vs.* North American Company, 253 U. S. 330, 333; Hijo *vs.* U. S., 194 U. S. 315, 323).

So, if the officer who takes the property acts without authority (Hove *vs.* U. S., 218 U. S. 322; Nahant *vs.* U. S., 136 Fed. 273; 153 Fed. 520; U. S. *vs.* Certain Lands, 145 Fed. 654), or if the officer acted upon the direct assertion that what he took was public property and not private property (Tempel *vs.* U. S., 248 U. S. 121; Hill *vs.* U. S., 149 U. S. 593; Schillinger *vs.* U. S., 115 U. S. 163; Langford's case, 101 U. S. 341) or if the officer when taking the property expressly denied any obligation upon the part of the government to pay (Ball Engineering Co. *vs.* White Co., 250 U. S. 46, 57) the taking is *ex delicto* and not *ex contractu* and there was, therefore, no implied promise to pay just compensation therefor.

There is no intimation in any case that there is no implied promise to pay just compensation where the authorized agent of the Government directly took private property, expressing an intention to pay, because, after the property was taken, an Army Officer sent a copy of the Presidential Proclamation, by which the property was taken, to the owner of the remainder who had long since parted with all right to the property taken.

To that extent this is a case of first impression.

To briefly indicate the errors which resulted in the decision in the Court below, we submit the

following analysis of the pertinent points of the opinion.

The elements of a "taking" out of which an implied contract to pay arises that are lacking, are said to be the following:

I. Lack of intention. There was a lack "of any intention to take the property of the claimant, even though it was actually taken". This lack of intention to take the property of the claimant is said to be demonstrated from the following facts:

(a) The Government "requisitioned the Bush Terminal from its owner, the Bush Terminal Company".

(b) The Government "served no instrument of requisition * * * either in form or effect upon the plaintiff * * *."

(c) The Government took the Bush Terminal "not simply for temporary use, but such use coupled with a right * * * to take over the title thereto".

(d) "There was no attempt in the instant case to acquire possession under plaintiff's title".

From the foregoing the opinion concludes that

(1) "The United States proceeded * * * * upon the theory that it had acquired, by virtue of its requisitioning the Bush Terminal from the Bush Terminal Company, the right to the use of Pier 8".

(2) Hence, there was no intention to take the property of the plaintiff.

II. The taking was *ex delicto*.

(1) "The General Superintendent of the Army Transport Service was notified by General Goethals, Acting Quartermaster General, that an

order had been issued by the President taking possession and control of the Bush Terminal".

(2) "General Goethals directed that, the General Superintendent, 'in conformity with said order', should take possession of and assume control of the premises".

(3) "Subsequent proceedings were by subordinates of the General Superintendent * * * and if otherwise than in compliance with instructions to proceed under the general order against the Bush Terminal, as they were not, they were without authority".

Hence the opinion concludes that

(1) No one having to do with the transaction, so far as the plaintiff is concerned, had any authority to requisition anything from it. Hence, if any person took anything from the plaintiff, it was taken *ex delicto* and not *ex contractu.*

III. The taking terminated the lease. The proposition is suggested that

(1) Since the Bush Terminal was taken over by the Government from the owner for war purposes authorized under the war power of the President, even though also by statute, such taking constituted a termination of Duckett's lease.

Hence, the opinion concludes that

(1) There could be no "taking" of that which was terminated, even though the termination was the direct consequence of the "taking".

We shall endeavor to point out both the contradictions of fact and errors of law in the foregoing opinion, which lie at the very foundation of the decision in their order in the following points:

POINT I.

The United States is conclusively presumed to have intended the natural consequences of its acts. If such acts were authorized and resulted in taking Duckett's property for public use, the United States impliedly promised to pay Duckett just compensation therefor.

The sole instrument of requisition was the President's proclamation, issued under direction, by the Secretary of War. From the moment that proclamation was signed and filed in the archives of the office of the Secretary of War, the United States had legal possession of the therein described portions of the Bush Terminal property. (Le Peyre *vs.* U. S., 84 U. S. 191). Whatever was done by Government officials after that time, to reduce that legal possession to actual possession that was within the limits of that proclamation, was the Act of the United States. If such acts resulted in the taking from Duckett of actual physical possession of this property for public use, even though such a result was not anticipated, or even though the United States acted under the belief that the private property taken belonged to someone else, the United States, nevertheless, promised by implication to pay Duckett just compensation therefor.

U. S. *vs.* Great Falls Mfg. Co., 112 U. S. 645.

Hollister *vs.* Benedict Mfg. Co., 113 U. S. 59.

U. S. *vs.* Palmer, 128 U. S. 262.

U. S. *vs.* Buffalo, etc. Co., 193 Fed. 905, Aff. 234 U. S. 228.

U. S. *vs.* Cress, Kelly, et al., 243 U. S. 316 at 328.

U. S. *vs.* Lynah, 188 U.S. 445.
U. S. *vs.* North American Transportation & Trading Co., 253 U. S. 330.
Langford *vs.* U. S., 101 U. S. 341.
Bigby *vs.* U. S., 188 U. S. 400.
U. S. *vs.* Honolulu Plantation Co., 122 Fed. 581, 585.

(a) *The United States did not requisition Pier 8, Bush Terminal from the Bush Terminal Company, but from Duckett.*

The controlling error of the Court below lies in the conclusion that what was taken was expressly taken from the Bush Terminal Company. This error undoubtedly arose from the confusion of the term "Bush Terminal" which is a generic term to cover the instrumentality as a whole with the then existing property rights of the Bush Terminal Company in that instrumentality. There is confusion between the Bush Terminal itself and the Bush Terminal Company, which, so far as the ownership of the property taken by the United States in question is concerned, are vastly different things.

The order of requisition was not addressed to the Bush Terminal Company, but "To Whom it May Concern" (10). The fee was not taken. What was taken was "possession and control" (10). The United States did not take possession of the property of the Bush Terminal Company in New York Harbor, but "of those portions of the Bush Terminal docks and warehouse property described in Schedule 'A' and shown on the map of Schedule 'B' hereto annexed in New York Harbor" (10).

The Bush Terminal Company is not mentioned by name or by necessary implication in the requisition. What the Government wanted was

the use and occupation of the described portions of the Bush Terminal property. It wanted that estate of the Bush Terminal Company or the estate of John Doe. For that purpose and to that end the Presidential proclamation was addressed "To Whom it May Concern". It concerned Duckett very much, since, so far as Pier 8 is concerned, the only estate taken by the requisition was the estate it owned. This the United States did not and could not take from the Bush Terminal Company. It is trite to say that one cannot take from a party that which it does not possess. The Bush Terminal Company did not have possession or control of this Pier or the right thereto. It follows that if the Government took everything that the Bush Terminal Company had it would not then have possession or control of Pier 8. It follows that the Government did not take possession and occupation from the Bush Terminal Company, because manifestly it could not take from the Bush Terminal Company that which it did not possess. The Government did take possession and control from the corporation that had it, to wit: Duckett, which would seem to demonstrate conclusively the fallacy lying at the basis of the decision of the Court of Claims in this case.

In the original opinion, however, much stress is laid on an erroneous conclusion of fact to the effect that "a Board of Appraisers was appointed to determine the compensation to be paid by the United States to the Bush Terminal *Company* (18-19) for the use of the Bush Terminal properties". "This award as made and accepted by the Bush Terminal Company covered the use by the United States of all of the properties taken, whether in the possession of the Bush Terminal Company, unleased, or in the possession of ten-

ants"(19). It was argued that these acts, done under the authority of the requisition addressed "To Whom it May Concern", manifested such an intention to take what it took from the Bush Terminal Company, whether that Company owned or possessed what it took or not, as to rebut the presumption of an implied promise to pay just compensation to the party "concerned" whose private property was directly and actually taken.

The acts of the Government officials in connection with this Board of Appraisers are matters of public record. This Court will take judicial notice of them.

The Board of Appraisers was first appointed by an order of January 9, 1918, which states merely that the Board is appointed "for the purpose of determining the rental value of the Bush Terminal" with no reference whatever as to whom compensation is to be paid. The amending order of November 2, 1918 on the other hand, expressly states that "the said Board is further authorized and directed to determine the value of the leasehold interest of each tenant of the said Bush Terminal Company, and, arrange, if practical, subject to approval, settlements with such tenants". Contrary to the conclusion drawn from the award to the Bush Terminal Company (13, 14) this award shows on its face that it does not include the use of all the properties taken. Provision is therein made for an increase in the monthly compensation to the Bush Terminal Company as the leases terminate from time to time.

When these matters were pointed out to the Court below, it took the position that they were quite immaterial and that the material matter in that respect was "that adjustment was made with the Bush Terminal (again confusing the Bush Terminal property with the Bush Terminal Com-

pany) and payment made in accordance with the award made by this Board of Appraisers" (28, 29).

As the matter now stands, therefore, so far as the acts of the Government are concerned, as manifesting its intention to take Duckett's pier not from Duckett who possessed it, but from the Bush Terminal Company who did not possess it, we have the following:

First, the proclamation directed "To Whom It May Concern"; second, an order of the Acting Quartermaster General to a subordinate officer to take possession of the property described as distinct from the interest of the Bush Terminal Company in that property so described; third, the acts of the officers under that order distinctly taking Duckett's property as such; fourth, the appointment of a Board of Appraisers, first to determine the rental value of the property and then specifically to determine the value of the leasehold interest of each tenant of the Bush Terminal Company in that property; fifth, the fact that this Board of Appraisers not only made awards to the Bush Terminal Company for the part of the property that it possessed, but awards to tenants situated in exactly the same position that Duckett was situated although that Board of Appraisers, under an agreement with the Bush Terminal Company agreed to pay rent for Pier 8 to the Bush Terminal Company and not to Duckett whose property the Government had taken. This very agreement recognizes the fact that it was Duckett's property that was taken, not that of the Bush Terminal Company. Can it be that an officer of the Government can make an agreement to pay one party for property taken, which concededly that party does not own and thus deprive the true and lawful owner of pay for it

under a Constitution which guarantees to citizens that private property shall not be taken without just compensation therefor?

To review the situation, neither the general requisition order of December 31, nor the order from the Quartermaster General to the General Superintendent of the Army Transport Service dated the same day, advising him of the requisition and instructing him "to take possession and control of the premises from this date" make any mention of the Bush Terminal Company whatsoever.

The original act or requisition, therefore, is entirely non-committal as to from whom the requisitioning was being done. When the Superintendent of the Army Transport Service came to take actual possession (as distinguished from legal possession which already passed by virtue of the requisition order) he proceeded both against the Bush Terminal Company and the lessee. To support the view of the Court of Claims he should merely have notified Bush Terminal Company of the requisition, demanded physical possession and left it to oust the tenants, but he did not do so—he proceeded similarly against Bush Terminal Company and the lessee—in fact if the dates on the notice are to govern, he proceeded first against the lessee (January 1st) and later against Bush Terminal Company (January 3rd). The next step was to award compensation and here again the United States had considered itself as having taken from the tenants, because it instructed the Board of Appraisers to determine the value of the leasehold interests and arrange settlement with the tenants. The Board of Appraisers accordingly made such determination and awarded compensation to the tenants and such compensation was actually paid in whole or in part to the tenants, except Duckett. It would seem difficult

to square this course of action on the part of the United States, with the intention, which the Court of Claims imputes to it, of dealing only with the Bush Terminal Company and ignoring the tenants.

Furthermore, does not the very nature of the thing taken show an intention to take and an actual taking from the tenants? The requisition order and subsequent notices read that "possession and control is taken". The intention to take no more than possession and control and not the fee is further shown by the additional statement in the requisition order that "steps will be promptly taken to ascertain the fair compensation to be paid for the temporary use of the Government of the premises and also the fair compensation to be paid for the property in the event that the Government shall determine prior to July 1st, 1918, to acquire absolute title thereto".

"Possession and control" of the piers were in the tenants and not in the Bush Terminal Company. The latter had absolutely no right to possession and could not give it. The Court of Claims imputes an intention upon the part of the Government to take from the Bush Terminal Company something which the latter did not have. An intention to take must imply an intention to take from someone. The most natural presumption would seem to be that such intention is to take from the person who has the thing taken and not from someone who has it not.

It is said that "the mere removal of the plaintiff as an obstacle to the enjoyment of *a right otherwise acquired*, does not measure up to liability upon an implied contract."

Right here again the Court fell into fundamental error. It has, heretofore, been pointed out that what the Government took and all that it took was "possession and control". That "right" had

never been "acquired" by the Government from the Bush Terminal Company for the simple reason that the Bush Terminal Company had long since parted with that "right" and conferred it upon Duckett. The Government could not "acquire a right" from the Bush Terminal Company that the Company did not possess. If the Government took everything that the Bush Terminal Company had it would not have "possession and control" of Pier 8. Duckett alone had what the Government took, to wit: "possession and control". It follows that Duckett's possession and control was not "an obstacle" to the enjoyment of a right that the Government took from Bush Terminal Company, but was the very essence of the thing taken and to which the Bush Terminal Company had no right or title.

What the Government took from Duckett was an estate for years, a concrete estate in the real property itself as well recognized in the law as the estate in fee simple.

In the opinion below it is stated that "established fundamental principles seem applicable" to the case at bar. There is no fundamental difference between the estate in land for three years and the same estate for ninety-nine years, nor between such an estate and a life estate. All of them are property and as such cannot be taken for public use without paying just compensation to their owner even when each of them is held by a different owner and the Government takes them all. All of them carry a right to possession and control, use and occupation for their respective terms.

Nichols on Eminent Domain—pars. 118, 119;
Lewis on Eminent Domain—par 285;
Hare *vs.* Fort Smith R. R. Co., 104 Ark. 187;

Colcough *vs.* Nashville, etc. R. R. Co., 2 Head (Tenn.) 171;
Chiesa *vs.* City of Des Moines, 158 Iowa 343;
B. & O. R. R. Co. *vs.* Thompson, 10 Md. 76, 87;
Kernochan *vs.* N. Y. E. R. R. Co., 128 N. Y. 559;
Kearney *vs.* M. E. R. R. Co., 129 N. Y. 76;
R. R. Co. *vs.* Eby, 107 Pa. 166;
Dyer *vs.* Wightman, 66 La. 425;
Consolidated Ice Co. *vs.* Pa. R. R., 224 Pa. 487;
Stubbings *vs.* Village of Evanston, 136 Ill. 37;
Chicago R. R. Co. *vs.* Dresel, 110 Ill. 89;
Chicago R. R. Co. vs. Chicago Mech. Inst., 239 Ill. 197;
Town of Nahant *vs.* United States, 136 Fed. 273;
City of Chicago *vs.* Messler, 38 Fed. 302;
Ellis *vs.* Walsh, 7 Mass. 246;
Corrigan *vs.* Chicago, 144 Ill. 537;
Harrisburg vs. Crangle, 3 Wats. & S. 460 (S. C. of Pa.) 1842;
Gluck *vs.* Baltimore, 81 Md. 315;
Biddle *vs.* Hussman, 23 Mo. 597;
Gilligan *vs.* Providence, 11 R. I. 258;
Manufacturing Co. *vs.* Water Co., 84 So. Carolina 306.

In *Nichols on Eminent Domain,* paragraphs 118, 119, it is said,

> "* * * Accordingly whenever it appears that there has been a 'taking' of land within the meaning of the constitution, it is not merely the owner of the fee who is entitled to compensation, but every person holding an estate or interest in the subject matter of the

> taking which will be recognized by the courts as valid as against the owner of the fee, is equally protected by the constitution.
>
> * * * It is well settled that life tenants and lessees for years, or from year to year, holding under a valid devise, grant, or lease, have such an interest in the property as to be classified as 'owners' in the constitutional sense, and to be entitled to be compensated for the taking of their interest in the property, or to sue for damages or apply for an injunction when an unlawful injury to the property under color of eminent domain is inflicted or threatened, and the same rules apply to a sublessee as to a tenant holding a lease directly from the owner of the fee."

In *Kearney* v. *M. E. R. R. Co., supra,* it was held that the lessee for years of property which is damaged by the erection of an elevated railroad structure adjacent to it is entitled to recover for such damages.

In *Town of Nahant* v. *U. S., supra,* at page 278, the Circuit Court of Appeals for the First Circuit said:

> "The authorities, we think, sustain the text of Lewis on Eminent Domain in respect to what constitutes a taking of property—that, whenever lawful rights of an individual to the possession, use, or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is pro tanto taken."

In *Corrigan* v. *Chicago, supra,* the Court said,

> "That the tenant, as the owner of an estate for years, is guaranteed just compensation before his title can be divested under the power of eminent domain, is not questioned. * * * He holds and enjoys the estate granted

> subject to the exercise of the sovereign power to appropriate his land to a public use, upon making to him just compensation, and if he suffers loss or is deprived of his estate, he is provided with the same remedy that is given to all other owners, and holds his title subject to this right, as his landlord holds his title."

In *Kohl et al.* v. *United States, supra,* while it was admitted that the owner of a leasehold was entitled to an award in case leased land was condemned by the government, it was held that the lessee was not entitled to a separate trial of the issues involved, but that the award to be made to both lessor and lessee should be heard at once. On page 377, the Court said:

> "The second assignment of error is, that the Circuit Court refused the demand of the defendants below, now plaintiffs in error, for a separate trial of the value of their estate in the property. They were lessees of one of the parcels sought to be taken, and they demanded a separate trial of the value of their interest; but the court overruled their demand, and required that the jury should appraise the value of the lot or parcel, and that the lessee should in the same trial try the value of their leasehold estate therein."

In the Kohl case the fee was taken as well as the leasehold, while here only the use and occupation was taken by the government. Therefore, there was no occasion to fix the value of the fee.

Assume that Duckett had acquired a ground lease for ninety-nine years and had erected this Pier thereon at the cost of a million dollars, and the Government took Duckett's estate in that property without paying just compensation therefor by requisitioning it—either through ignorance, mistake or design,—from the owner of the reversion!

Assume that John Bush owned a life estate in the Bush Terminal property described in the schedule and shown on the map referred to and James Bush owned the remainder. Assume the Government requisitioned the use and occupation of the property described for three months, and sent a copy of the requisition proclamation to James Bush the remainderman instead of to John Bush the life tenant, can it be that the Government's mistake in sending the copy of the requisition proclamation or its ignorance of the true owner of the thing taken, deprives the true owner of the thing to be paid for under a Constitution that grants to a citizen that private property shall not be taken for public use without just compensation.

Assume that the Bush Terminal Company owned the property described in the Schedule and shown on the map, in fee simple, and the Equitable Life Assurance Society owned a first mortgage on the same property to secure a loan of 80% of its value. The legal title would then be in the Equitable Life Assurance Society and the Bush Terminal Company would be the owner of the equity of redemption. Assume then that the United States requisitioned the "absolute title" to the premises and sent the copy of the requisition proclamation to the Bush Terminal Company and notified the Equitable Life Assurance Society that he had requisitioned the property, can it be, that under such circumstances, the Government could pay the Bush Terminal Company just compensation for its equity of redemption and without compensation remove the Equitable Life Assurance Society as "an obstacle to the enjoyment of a right (absolute title) that the Government took from the Bush Terminal Company".

Fundamentally, there is no difference between the foregoing hypothetical cases and the case at bar.

What the Government took was possession and control, use and occupation. Can it be that the Government could take this property and refuse to pay just compensation to Duckett claiming that it took the property from the Bush Terminal Company and at the same time refuse to pay compensation to the Bush Terminal Company because what it took, it actually took from Duckett and not from the Bush Terminal Company.

Granting that the Court of Claims is right in its conclusion, that the Government acted upon the theory that it took possession and control of this property from the Bush Terminal Company, such fact would not rebut the presumption that the Government intended to pay the rightful owner of the property just compensation therefor.

Pumpelly *vs.* Green Bay Co., 13 Wall 177;
U. S. *vs.* Lynah, 188 U. S. 445;
U. S. *vs.* Cress, 243 U. S. 316;
U. S. *vs.* Welch, 217 U. S. 333;
Baker *vs.* State, 63 Misc. 549 (N. Y. Court of Claims);
Musanti *vs.* State, 131 N. Y. Supp. 20;
Brown *vs.* Powell, 25 Pa. 229.

In *Pumpelly* vs. *Green Bay Co., supra,* the plaintiff was the owner of land which was overflowed as a result of the erection of a dam built for public purposes under the Statute of Wisconsin. In that case the Government never acted directly against the claimants or their property, never negotiated with them nor in any way recognized their interests at the time of committing

their acts which the Court found amounted to a taking. The Government acted upon the theory that what it took, it took from others, yet the Court held that the Government must be conclusively presumed to have intended the actual consequences of its authorized acts and if those authorized acts result in taking the property of the plaintiff, whether it was intended to take that property or not, it was a taking which implied a promise, upon the part of the Government, to pay to the owner of the property actually taken, just compensation therefor. Note the following from the opinion of Mr. Justice Miller in that case:

> "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which had received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect subject to total destruction without making any compensation, because in the narrowest sense of that word, it has not been taken for the public use."

In the case of *U. S.* vs. *Lynah, supra,* the lands of the plaintiff were overflowed and thereby rendered valueless as the result of the building by the United States of dams and dikes in the Savannah River for the purpose of improving its navigability. In this case the United States never acted directly against the plaintiff or his property, nego-

tiated with him or in any way recognized his interest at the time of committing the acts which the Court found amounted to a taking. Nevertheless, the Court held that the plaintiff's lands were actually taken for a public use within the meaning of the Fifth Amendment. Note the following from the opinion:—

> "Was there a taking? There was no condemnation proceeding instituted by the Government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the Government, and if either of these be an essential element in the taking of lands, within the scope of the Fifth Amendment, there was no taking.
>
> "It is clear from these authorities that when the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment while the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested."

In the *United States* vs. *Cress, supra,* the United States in improving the navigability of the Cumberland River, by means of a lock and dam raised the water above the natural level so that lands of a non-navigable tributary, not normally invaded thereby, were subjected permanently to periodical overflows, substantially injuring though not destroying its value. In that case there was no direct action taken by the Government against the lands overflowed, yet the Court held that the authorized acts of the Government had naturally resulted in a partial taking of the property of the plaintiff and that these acts constitute such a taking as to imply a promise upon

the part of the United States to compensate the owner to the extent of the injury.

In the case of the *United States* v. *Welch, supra,* the plaintiff owned a strip of land which was permanently flooded by the construction of a dam. They also had a right of way over adjoining property, which right of way led through this flooded land and was the only means of access to other of their land which was not flooded. This right of way became valueless when the approach to it was lost. There was no direct action by the United States against the owner of the right of way to acquire the same. Yet the Court held that the natural consequences of the authorized acts of the Government had resulted in the destruction of this right of way and there was, therefore, an implied promise upon the part of the United States to pay just compensation therefor. Note the following from the opinion:—

> "A private right of way is an easement and is land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits it must pay. But if it were only destroyed and ended a destruction for public purposes may as well be a taking as would be an appropriation for the same end."

In the case of *Baker* v. *The State, supra,* the State of New York appropriated certain property which at the time was under lease; the map and notice provided by law were duly served prior to the appropriation, on the owner of the fee but no map or notice was served on the tenant. Later there was a settlement made with the owner of the fee. There was no direct action taken by the State against the plaintiff. The State took what it did take under the claim that it was entitled to take it under the action against the owner of the

fee, yet the Court held that this action could not bar the tenant who was entitled to just compensation for his property which was taken by the State.

In the case of *Brown* v. *Powell, supra,* statutory authority was conferred to appropriate certain lands for public use. Acting under this authority the defendant secured a license from the owner of the fee and ignored the tenant in possession and took no action against the tenant whatever and did what it did under the contention that it had a right to do it under this license from the owner. Yet the Court held that what was in fact done under the authorized act was to take the property of the tenant and therefore the tenant was entitled to just compensation for the property actually taken.

(b) *The instrument served on Duckett was, while different in form, the same in effect as that served on the Bush Terminal Company.* In both cases it was a letter. The letter to the Bush Terminal Company was dated January 3, 1918, signed by an Army officer and recited *in haec verba* the Presidential proclamation on December 31, 1917. The letter to Duckett was dated January 1, 1918, was signed by an Army officer and recited the substance and effect of the Presidential proclamation. It also contained some suggestions about surrendering actual possession of the Pier. Both were notices to "persons concerned" advising them of the action that the Government had already taken. Neither of them were "instruments of requisition". The only instrument of requisition necessary or possible was the Presidential proclamation which was in being, full and complete and in complete legal operation before either letter was written. There was no more of a commandeering order against the Bush Terminal

Company than there was against Duckett. The commandeering order was addressed "To Whom it May Concern" because doubtless it concerned both the Bush Terminal Company, Duckett and other tenants. They were both notified of that order in the process of taking actual possession of the property, in different form to be sure, but to the same effect. Can it be that the form of the special notice that an army officer gives to the party whose property has already been requisitioned by the President determines whether or not the party whose private property is taken for public use may have pay therefor under a Constitution which grants to the citizen that private property shall not be taken for public use without just compensation?

The Court attempts to distinguish between the form of the notice sent to the Bush Terminal Company and that sent to Duckett and it is true that the wording is different. That sent to Bush Terminal Company dated January 3, 1918, is an exact copy of the general requisition order dated December 31, 1917 signed by the Secretary of War and reads "possession and control is hereby taken." That sent to Duckett is dated January 1, 1918 and is headed "Notice to Vacate" and reads "The Bush Terminal has this day been requisitioned—and possession thereof has passed to the United States". But they are both mere notices of requisition rather than actual requisition orders. The Court so considers the letter to Bush Terminal Company, for it says "a general commandeering order was issued—*notice* to that effect being served on the Bush Terminal Company." It could, in fact, be nothing else. The order of December 31, 1917 addressed "To Whom it May Concern" states that "possession and control is hereby taken". The letter to the ten-

ants dated January 1, 1918 states that "The Bush Terminal has this day been requisitioned." It seems obvious, therefore, that the requisition had already taken place before January 3, 1918, the date of the letter to Bush Terminal Company, so that such letter was a mere notice of requisition, even though it reads like a requisition order, and as a notice of requisition it is difficult to see any distinction between it and the notice to the tenants, the only difference being that the tenants' deals more specifically with the surrendering of actual physical possession of the pier.

(c) *The requisition did not authorize the Government to take title to the Bush Terminal property.* It is said in the opinion below that the Government took the temporary use and occupation of the Bush Terminal "coupled with a right to determine within a given time whether it would take over the title thereto". The facts found by the Court below directly contradict this conclusion. The proclamation specifically limits the thing taken to temporary possession and control. "Possession and control is hereby taken * * * to the end that they may be utilized for such time as may be required for the transportation of troops * * * and for such other purposes connected with the emergency as may be needful and desirable."

It is quite possible that the President may have contemplated the possibility of taking over the absolute title to the property some time within the next six months. For the proclamation provided that steps would be promptly taken to ascertain the fair compensation to be paid for the temporary use of the premises and the price to be paid for such property, *if within the next six months it should be decided to acquire absolute title thereto,* but that is very far from acquiring "ab-

solute title". There was nothing in the proclamation as issued that the right to take absolute title can be applied to. The Government had just as much right to acquire absolute title before that proclamation was issued as it had afterward. To acquire absolute title, however, the President would have to issue another proclamation. Certainly under a proclamation authorizing the taking of temporary use and occupation, any taking of absolute title would be unauthorized and tortious.

(d) *Not only was there an attempt to acquire possession under Duckett's title, but Duckett was the only party who had title to what the Government was expressly authorized to take and did take in the case at bar.* It is said in the opinion below "there was no attempt in the instant case to acquire possession under the plaintiff's title."

The United States took possession of plaintiff's property under a proclamation addressed "To Whom it May Concern". It took actual possession of plaintiff's property by notifying it that it had taken legal possession of it and ordering Duckett to vacate. If these acts do not constitute the taking of Duckett's property under its title, how would the United States go about such a taking? Certainly, if the United States were to take possession of Pier 8 by virtue of a claim that it was the property of the Bush Terminal Company, it would notify the Bush Terminal Company to vacate or to cause any party in possession under the Bush Terminal Company's right of possession, to vacate. This it did not do. It follows that the conclusion of the Court below, that there was no attempt in the instant case to acquire possession under the plaintiff's title, is not sustained by the facts upon which the opinion is expressly based.

Must the United States have accurate knowledge of the precise interests of all persons in a particular piece of property at the precise time of the taking before the United States can be said to have intended to take the property, and if, by a proclamation addressed "To Whom it May Concern", the United States takes property, can it be said that the mere similarity of the name of the terminal and the name of the owner of part of the estate, precludes the rest? If fundamental principle must defeat the plaintiff in this case, it should be a fundamental principle of practical universal application. In order to sustain this decision of the Court of Claims, the Fifth Amendment must be held to mean that private property shall not be taken for public use without just compensation, *provided that* at the precise time of the taking the United States has precise knowledge of the particular individual who owns the particular property taken.

POINT II.

All that was done was specifically authorized by the President's proclamation taking possession and control of the property described and addressed not to the Bush Terminal Company but "to whom it may concern".

The Bush Terminal Company's name is not mentioned in the requisition order. What was to be taken was property described by a schedule and a map, not by name of, but regardless of the names of the owners. The Bush Terminal Company's name is not mentioned in the order of the

Acting Quartermaster General to the General Superintendent of the Army Transport Service. That order directed that possession and control of property described by a schedule and shown on a map be taken in conformity with an order addressed not to the Bush Terminal Company, or to any other person, firm or corporation, but "To Whom it May Concern". That order did not limit the authority of the General Superintendent of the Army Transport Service to the taking of the property of the Bush Terminal Company. On the contrary, it, in effect, directed him to take possession and control of the described property regardless of whom it concerned. It follows that since this requisition order concerned Duckett's property and since the authorized agent of the Government took the property specified in the proclamation order from the party it concerned, that officer was specifically authorized to do what he did and the taking of Duckett's property from Duckett was not tortious, but authorized.

POINT III.

The requisition of Duckett's property suspended the operation of Duckett's lease with the Bush Terminal Company; it did not terminate it.

The Bush Terminal Company had agreed to warrant and defend the possession and the use of the Pier for Duckett. Since possession was taken by the Sovereign of both, the obligations of both under the lease were suspended, while the Sovereign was in possession.

Gale, etc. *vs.* Goodloe, 101 U. S. 612.

The lessee is entitled to the value of the lease over the rent during the term of the Sovereign's occupation.

Corrigan *vs.* Chicago, 145 Ill. 537.

Governmental taking of a leasehold does not merely frustrate a right of action of the lessee against the lessor, but constitutes a direct taking of the lessee's property, an estate or interest in the land itself. This is not a case of consequential damage by an authorized Governmental action. Here the plaintiff's rights have not merely been frustrated or ended but "possession and occupation", its estate in the land, has been directly taken.

In the case of *Omnia Commercial Co.* vs. *U. S.*, 261 U. S. 512, the plaintiff sought to recover consequential damage as if such damage was property—a right of priority. Plaintiff had a contract by which he acquired the right to purchase steel plate from the Allegheny Steel Co. at a price under the Market. Before deliveries were made the United States requisitioned the Steel Company's entire production and directed that Company not to comply with plaintiff's contract under pain of having its entire plant taken over and operated for the public use. The complaint alleged that thus the United States took plaintiff's right of priority and thereby appropriated plaintiff's property to the public use and sought just compensation under Article V of the Constitution.

The Court held that the conclusion to be drawn from the cases is that for consequential loss or injury resulting from lawful governmental action, the law affords no remedy. There must be a direct appropriation as distinct from consequential

damage resulting from lawful governmental action.

The plaintiff's position was that since the Government requisitioned the future production of the Steel Company and since but for such requisition the plaintiff would have received its steel, it follows that the Government "took" plaintiff's steel. "This, however, is to confound the contract with the subject matter".

This contract was wholly executory. The Government did not take the right to enforce the contract which was all that the plaintiff had. As a result of this lawful Governmental action, the performance of the contract was rendered impossible. It was not appropriated but ended.

If one makes a contract for the sale and delivery of property, the Government by requisitioning the subject matter does not thereby take the contract. Frustration and appropriation are essentially different things. To point out the difference, the Court cites the case of *Monongahela Navigation Co. against the United States,* 148 U. S. 312, where a lock and dam were constructed and the Company gave a franchise to exact a toll "the contract, therefore, was, not merely a contract in respect of the property taken, but an integral part of it". So in the case at bar, what the Government took was not an executory contract for the future delivery of possession and control of Pier 8. It took Duckett's estate for years. Duckett's lease was not merely a contract in respect to Pier 8; it was an integral part of the property itself and the only part of the property that the Government took.

If Duckett instead of owning an estate for years in Pier 8, had had at the time of requisition only a contract by which the Bush Terminal Company

agreed to convey such an estate at some time in the future, the Omnia case would be analogous to the case at bar. Under such circumstances there would be a mere frustration of a contract and not an appropriation of property. But the facts actually are that such a contract had already been performed and Duckett was the owner of the estate for years in possession—the property requisitioned. It is as though in the Omnia case the plaintiff's contract had been performed and the steel delivered to it and then requisitioned. In such event it is clear, from the Court's reasoning, that its opinion would have been to the contrary of that rendered. And so, in the instant case, it is equally clear that there has been a taking by the Government of the plaintiff's property for which it is entitled to just compensation.

POINT IV.

The judgment and order dismissing the petition should be reversed and the case remanded with direction to enter judgment for the appellant for the value of the use and occupation of the pier as found by the Court of Claims.

Respectfully submitted,

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